



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2013

Ms. Janet R. Cassels
Counsel for the City of Diboll
Cassels & Reynolds, L.L.P.
P.O. Box 1626
Lufkin, Texas 75902-1626

OR2013-22217

Dear Ms. Cassels:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 509018.

The City of Diboll (the "city"), which you represent, received three requests from different requestors for information related to a specified accident. You state you have released some information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.101, 552.1085, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by section 773.091 of the Health and Safety Code, which provides as follows:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), emergency medical services records are deemed confidential under section 773.091. *See id.* § 773.091. Upon review, we find section 773.091 of the Health and Safety Code is applicable to the information you have marked. You indicate the city has released the information subject to section 773.091(g). Therefore, with the exception of the information subject to section 773.091(g), the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See Gov’t Code* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find portions of the submitted information, which we have marked, consist of CHRI that is confidential under section 411.083. Thus, the city must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code.¹ However, none of the remaining information constitutes confidential

¹As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

CHRI for the purposes of chapter 411. Therefore, the city may not withhold any of the remaining information under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining only to a deceased individual may not be withheld on common-law privacy grounds. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); see also Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.² However, we find no portion of the remaining information pertains to a living individual and is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first is the interest in independence in making certain important decisions relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs” and the scope of information protected is narrower than that under the

²As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

common-law doctrine of privacy. *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492). However, as previously noted, the right to privacy is a personal right that “terminates upon the death of the person whose privacy is invaded;” therefore, it may not be asserted solely on behalf of a deceased individual. *Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); ORD 272 at 1. The United States Supreme Court, however, has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

You have submitted photographs that pertain solely to a deceased individual and may not be withheld from disclosure based on her privacy interests. However, you provide a representation showing the deceased individual’s next of kin has asserted a privacy interest in the information at issue. Upon review, we find the next of kin’s privacy interests in the photographs of the deceased individual outweigh the public’s interest in the disclosure of this information. However, the deceased individual’s next of kin is one of the requestors and is the representative of the deceased individual’s estate. Under section 552.023 of the Government Code, “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.” Gov’t Code § 552.023; *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself or person for whom she is authorized representative). Accordingly, the city may not withhold the information at issue from this requestor under section 552.101 on the basis of constitutional privacy. You state the city has released this information to this requestor. As to the two remaining requestors, we conclude the city must withhold the photographs depicting the deceased individual under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*.³

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency or an agency of another state or country is excepted from public release. Gov’t Code § 552.130(a). Upon review, we find the motor vehicle record information we have marked falls within the scope of section 552.130 of the Government Code. However, we note that, like common-law privacy under section 552.101 of the Government Code, section 552.130 protects personal privacy interests, and as previously noted, this right expires at death. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229,

³As our ruling is dispositive for this information, we need not address your remaining argument under section 552.1085 of the Government Code, except to note that the requestor who has a right of access to the photographs of his deceased spouse under section 552.023 would also be permitted to view the photographs under section 552.1085(d)(1). *See* Gov’t Code § 552.1085(d)(1), (a)(1)(A).

H-917; ORD 272 at 1. In this instance, one of the requestors is the owner of one of the vehicles involved in the accident. Thus, pursuant to section 552.023 of the Government Code, this requestor has a right of access to the motor vehicle information for this vehicle. *See* Gov't Code § 552.023; ORD 481 at 4. Thus, the city may not withhold the marked motor vehicle record information relating to this requestor's vehicle from this requestor under section 552.130 of the Government Code. Otherwise, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.⁴ However, no portion of the remaining information consists of the motor vehicle record information of a living individual. Accordingly, no portion of the remaining information may be withheld under section 552.130 of the Government Code.

In summary, with the exception of the information subject to section 773.091(g), the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The city must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*, the city must withhold the photographs depicting the deceased individual from the two requestors who are not the deceased's next of kin. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code, but must release the motor vehicle record information related to the vehicle owned by one of the requestors to that requestor. The remaining information must be released.⁵

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

⁴We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

⁵We note the remaining information contains social security numbers of living individuals. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Neal', with a stylized, cursive script.

Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 509018

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)